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James M. Ward, an individual d/b/a Mid-South Construction and Tri-State Building and Construction Trades Council, National Building and Construction Trades Department, AFL-CIO.
Case 9-CA-36510-1

July 8, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Upon a charge filed by the Union on January 19, 1999, the General Counsel of the National Labor Relations Board issued a complaint on March 26, 1999, against James M. Ward, an individual d/b/a Mid-South Construction, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On June 8, 1999, the General Counsel filed a Motion for Summary Judgment with the Board. On June 9, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated May 13, 1999, notified the Respondent that unless an answer were received by May 21, 1999, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.¹

¹ In the complaint, the General Counsel seeks an order requiring the Respondent to preserve and, on request, provide at the office designated by the Board or its agents, copies of specified records necessary to analyze the amount of backpay due under the terms of the Board's Order, including electronic copies, if such records are stored in electronic form.

We find that electronic copies of the relevant records, where such already exist, are encompassed within the Board's traditional remedial language. See generally Fed.R.Civ.P. 34 (definition of "document" includes data compilations). See also *Bills v. Kennecott Corp.*, 108

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been owned by James M. Ward, a sole proprietorship, doing business as Mid-South Construction, with an office and place of business in Jemison, Alabama, and has been engaged as a building contractor in the construction business. During the 12 months preceding issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$50,000 for services performed outside the State of Alabama. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent, by its superintendent and agent Richard Hatley, at the CVS Pharmacy jobsite in Ashland, Kentucky: (1) on about July 22, 1998, told applicants for employment that the Respondent would not hire anyone who was a member of a labor organization; and (2) on about August 5, 1998, interrogated employee-applicants concerning their membership in a labor organization. In addition, on about August 6, 1998, the Respondent failed and refused to consider for employment or hire Joe Brumfield and Andrew Land.

Further, on about August 6, 1998, the Respondent terminated the employment of the following employees:

Donald Huff	Steve Montoney
Michael Jessee	Charles E. Dolen
Charles E. Dolen Jr.	Roger Damron
Greg Damron	Timothy D. Kirk
Stephen R. Conley	Lester Murray
John F. Moore	

F.R.D. 459 (D.Utah 1985) (requesting party need not accept only data that exists in traditional forms, but may discover the same information when stored in electronic form in a computer); *National Union Electric Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1257 (E.D. Pa. 1980) (same). Moreover, the Respondent has not established that it would be prejudiced in any way by a requirement that it produce electronic copies of these documents. Accordingly, and to clarify any ambiguity with respect to this matter, we have provided in the Order for the production of electronic copies of the specified backpay records if they are stored in electronic form.

With respect to the General Counsel's proposed requirement that the Respondent submit copies of the necessary backpay records at the office designated by the Board or its agents, however, we find that this proceeding does not satisfactorily present the question of whether a respondent should be ordered to provide copies of its records in this manner. We accordingly decline to order the Respondent to do so in connection with this case.

The Respondent engaged in the conduct described above because the named job applicants and employees of the Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSION OF LAW

By the statements and interrogations described above, the Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act. In addition, by its refusal to consider for employment or to hire applicants Brumfield and Land, and by the discharges of its employees named above, the Respondent has discriminated in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act. The Respondent has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) of the Act by refusing to consider for employment or to hire Joe Brumfield and Andrew Land, we shall order the Respondent to offer them immediate employment that they would have had, but for the unlawful discrimination against them, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Further, having found that the Respondent has violated Section 8(a)(3) and (1) by discharging employees Donald Huff, Michael Jessee, Charles E. Dolen Jr., Greg Damron, Stephen R. Conley, John F. Moore, Steve Montoney, Charles E. Dolen, Roger Damron, Timothy D. Kirk, and Lester Murray, we shall order the Respondent to offer them full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed. In addition, we shall order the Respondent to make these employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We also shall order the Respondent to remove from its files any references to the unlawful refusals to consider for employment or to hire Brumfield and Land, and to the unlawful discharges of the above-named employees, and to notify the discriminatees in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, James M. Ward, an individual d/b/a Mid-South Construction, Jemison, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling applicants for employment that it would not hire anyone who was a member of a labor organization.

(b) Interrogating employee-applicants concerning their membership in a labor organization.

(c) Refusing to consider applicants for employment and/or to hire them because they join, support, or assist Tri-State Building and Construction Trades Council, National Building and Construction Trades Department, AFL-CIO, or any other labor organization, or engage in concerted activities, or to discourage employees from engaging in concerted activities.

(d) Discharging or otherwise discriminating against employees because they join, support, or assist the Union, or any other labor organization, or engage in concerted activities, or to discourage employees from engaging in concerted activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Joe Brumfield and Andrew Land immediate employment in the same positions that they would have had, but for its unlawful discrimination against them or, if those jobs no longer exist, to substantially equivalent positions.

(b) Within 14 days from the date of this Order, offer the employees listed below full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

Donald Huff	Steve Montoney
Michael Jessee	Charles E. Dolen
Charles E. Dolen Jr.	Roger Damron
Greg Damron	Timothy D. Kirk
Stephen R. Conley	Lester Murray
John F. Moore	

(c) Make the aforementioned discharged employees and applicants Brumfield and Land whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges and the unlawful refusals to consider for employment and/or to hire in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharges of

the employees named above and to the unlawful refusals to consider for employment or to hire, and within 3 days thereafter, notify the discriminatees in writing that this has been done and that the unlawful conduct will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Jemison, Alabama, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 22, 1998.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 8, 1999

Sarah M. Fox, Member

Wilma B. Liebman, Member

Peter J. Hurtgen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell applicants for employment that we would not hire anyone who was a member of a labor organization.

WE WILL NOT interrogate employee-applicants concerning their membership in a labor organization.

WE WILL NOT refuse to consider applicants for employment and/or to hire them because they join, support, or assist Tri-State Building and Construction Trades Council, National Building and Construction Trades Department, AFL-CIO, or any other labor organization, or engage in concerted activities, or to discourage employees from engaging in concerted activities.

WE WILL NOT discharge or otherwise discriminate against you because you join, support, or assist the Union, or any other labor organization, or engage in concerted activities, or to discourage you from engaging in concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Joe Brumfield and Andrew Land immediate employment in the same positions that they would have had, but for our unlawful discrimination against them or, if those jobs no longer exist, to substantially equivalent positions.

WE WILL, within 14 days from the date of this Order, offer the employees listed below full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

Donald Huff Steve Montoney

Michael Jessee Charles E. Dolen

Charles E. Dolen Jr. Roger Damron

Greg Damron Timothy D. Kirk

Stephen R. Conley Lester Murray

John F. Moore

WE WILL make the aforementioned discharged employees and applicants Brumfield and Land, whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges and the unlawful refusals to consider for employment and/or to hire, with interest.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful discharges of the employees named above and to the unlawful refusals to consider for employment or to employ, and within 3 days thereafter, WE WILL notify them

in writing that this has been done and that the unlawful conduct will not be used against them in any way.

JAMES M. WARD, AN INDIVIDUAL D/B/A MID-SOUTH CONSTRUCTION